84-1211

Office-Supreme Court, U.S.
FILED
JAN 2 1985
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THOMAS M. NORMINTON and LEVY & NORMINTON,

Petitioners,

v.

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THOMAS M. NORMINTON
LEVY & NORMINTON
815 Moraga Drive
Los Angeles, California 90049
Telephone: (213) 471-3000

Attorneys for Petitioners

93

QUESTIONS PRESENTED

Is the imposition of sanctions against counsel for expressing, in good faith, arguments on an appeal, an unconstitutional abridgment of the First Amendment right of free speech and the right to petition government for redress of grievances?

PARTIES BELOW

The parties to the proceedings below were Maple Properties, plaintiff ("Plaintiff"), and Betty H. Harris, Joann Ruden, and Erwin Okun, defendants ("Defendants").

TABLE OF CONTENTS

	Page
OPINION BELOW	3
JURISDICTION	4
CONSTITUTIONAL PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	5
1. Facts Underlying the Original Action	6
2. Procedural History	9
3. The Sanction Proceedings	12
REASONS FOR GRANTING THE WRIT	14
CONCLUSION	29
APPENDIX A	
APPENDIX B	
APPENDIX C	

TABLE OF AUTHORITIES

Cases	Page
Bill Johnson's Restaurants, Inc. v. NLRB, 103 S.Ct. 2161 (1983)	17
Bose Corp. v. Consumers Union of United States, Inc., 104 S.Ct. 1949 (1984)	22,27
Brown v. Hartlage, 456 U.S. 45 (1982)	23
Edwards v. South Carolina, 372 U.S. 229 (1963)	26
Herbert v. Lando, 441 U.S. 153 (1979)	22,25
In re Marriage of Flaherty, 31 Cal.3d 637 (1982)	12,19
Maple Properties v. Superior Court of Los Angeles County, 454 U.S. 1099 (1981)	11
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	21,22, 27,28
Okun v. Superior Court, 29 Cal.3d 442 (1981)	9,12
St. Amant v. Thompson, 390 U.S. 727 (1968)	22,26

TABLE OF AUTHORITIES (Cont.)

	Page
United Mine Workers v. Illinois State Bar Association, 389 U.S. 217 (1967).....	17
Constitutional Provisions	
United States Constitution, First Amendment.....	4,15, 17,20, 24,25, 28
Statutes	
28 United States Code 1257.....	4
Authorities	
Risinger, Honesty in Pleading and its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11, 61 Minn.L.Rev. 1, 57 (1976).....	29

OPINION BELOW

The opinion of the Court of Appeal of the State of California, officially cited as 158 Cal.App.3d 997 and unofficially cited as 205 Cal.Rptr. 532, appears as Appendix A to this petition. The October 4, 1984 order of the California Supreme Court denying Petitioners' petition for hearing appears as Appendix B to this petition.

The Petitioners Thomas M. Norminton and Levy & Norminton respectfully request that a writ of certiorari be issued to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, entered in this proceeding on August 1, 1984, and modified August 9, 1984.

JURISDICTION

The order of the Supreme Court of the State of California, denying Petitioners' petition for a hearing to review the decision of the Court of Appeal of the State of California, was filed on October 4, 1984, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment, United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

The Court of Appeal ("Respondent") levied sanctions totalling $20,000 against Petitioners, for bringing a partially frivolous appeal before that Court during the course of Petitioners' representation of Plaintiff. Respondent assessed the sanctions against Petitioners on the ground that certain arguments made by Petitioners on appeal were objectively frivolous; Respondent held that it need not address the question of whether such arguments were made by Petitioners in subjective bad faith. The original action was for libel, slander, interference with prospective economic advantage, and civil rights violations, arising from statements made during a dispute over land development in Beverly Hills, California. The instant petition only seeks

review of Respondent's order imposing sanctions; Petitioners do not seek review of the substantive merits of the appeal.

1. Facts Underlying the Original Action.

Plaintiff alleged in its First Amended Complaint, Second Amended Complaint, and in the amendment it sought to add (collectively, the "Complaint"), that it is a limited partnership including alien Iranians who own, and desire to develop, real property in an area of Beverly Hills (the "City") known as the Industrial Zone. On November 28, 1978, the Beverly Hills City Council adopted an ordinance to alter the zoning of the Industrial Zone, enabling Plaintiff to construct condominiums on its property.

Plaintiff further alleged that Defendants are residents of the City who

dislike Plaintiff's alien partners because they are Iranians. Defendants opposed any development by Plaintiff of its property. After the City amended the zoning ordinance to allow the construction of condominiums, Defendants conspired to prevent Plaintiff from developing its property. As part of this conspiracy, Defendants agreed to circulate petitions in order to place on the City ballot a measure, Proposition B, to challenge the zoning amendment. Defendants further conspired to defeat the zoning in the City election by falsely charging in criminal complaints filed with the authorities as well as in statements made to the public that, among other things, Plaintiff had bribed the City Council in order to obtain the favorable zoning.

In addition, in implementation of the conspiracy, the Complaint asserted that Defendants circulated petitions, filed them with the City Clerk, and caused the City Council to put the new zoning to a vote of the City's electorate. Defendants instigated, and then publicly announced, an FBI investigation of Plaintiff's relationship with Richard Stone ("Stone"), a member of the Beverly Hills City Council. In an allegedly slanderous statement that was circulated throughout the City, Defendants maintained that Plaintiff had entered into an illegal relationship with Stone, an attorney who had at one time represented Plaintiff and one of its limited partners. Defendants made similar charges in letters published in local newspapers and

in the official Ballot Argument mailed to all of the City's voters.

Based upon the foregoing allegations, Plaintiff sought in its Complaint damages for libel, slander, civil rights violations, and interference with prospective economic advantage.

2. Procedural History.

On September 28, 1979, Plaintiff filed the Complaint in the Superior Court of Los Angeles County ("Superior Court"). Defendants demurred to all of Plaintiff's causes of action. The Superior Court sustained some of Defendants' demurrers and overruled others, and the case proceeded up to the California Supreme Court.

On June 15, 1981, the California Supreme Court issued its opinion, Okun v. Superior Court, 29 Cal.3d 442, 175

Cal.Rptr. 157, 629 P.2d 1369 (1981), in which it issued a writ of mandate directing the Superior Court (1) to vacate its order overruling Defendants' demurrers to the Second Cause of Action for Libel, Third Cause of Action for Libel, Fifth Cause of Action for Conspiracy to Commit Libel, and Sixth Cause of Action for Conspiracy to Commit Slander, and (2) to issue an order sustaining the demurrers to the Second, Third, and Fifth Causes of Action without leave to amend and sustaining the demurrer to the Sixth Cause of Action with leave to amend. Several Causes of Action were not before the California Supreme Court.

Both Plaintiff and Defendants filed petitions for rehearing; on July 15, 1981, the California Supreme Court denied without opinion both petitions. Plain-

tiff then petitioned this Court for a writ of certiorari to the California Supreme Court. This petition was denied on December 7, 1981. Sub nom., Maple Properties v. Superior Court of Los Angeles County, 454 U.S. 1099 (1981).

On March 15, 1982, Plaintiff filed in the Superior Court its Second Amended Complaint with causes of action for slander and conspiracy to commit slander. Defendants demurred to both of these causes of action, and the Superior Court sustained both demurrers without leave to amend. All causes of action in the various pleadings having been disposed of on demurrer, on May 4, 1982, the Superior Court issued an Order of Dismissal.

Plaintiff appealed, seeking review of all causes of action, including the libel counts.

3. The Sanction Proceedings.

On May 23, 1984, Respondent issued an Order to Show Cause why sanctions should not be awarded ("OSC") against Plaintiff and/or Petitioners. Following a hearing, Respondent filed its opinion on August 1, 1984. The opinion was modified by an Order filed on August 9, 1984.

Respondent found that the California Supreme Court's opinion was law of the case and precluded further review of the libel causes of action. Respondent found that the appeal of the libel counts, in light of the Okun decision, was objectively frivolous, and therefore constituted sanctionable conduct, under the standard articulated by the California Supreme Court in In re Marriage of Flaherty, 31 Cal.3d 637, 650, 646 P.2d 179, 187, 183 Cal.Rptr. 508, 516 (1982):

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

> "[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive - to harass the respondent or delay the effect of an adverse judgment - or when it indisputably has no merit - when any reasonable attorney would agree that the appeal is totally and completely without merit."

Respondent declined to address the question of whether the appeal was frivolous on a "subjective" basis. Respondent ruled that since the appeal was objectively frivolous, sanctions could be imposed even if the record failed to demonstrate that it was "subjectively" frivolous.

Respondent held, therefore, that sanctions could be imposed for an appeal deemed partially frivolous, and not subjectively in bad faith, where the frivolous claims are a "significant and material part of the appeal." (Emphasis

added.) Respondent concluded that a sanction of $20,000 should be assessed against Petitioners.

The OSC, set out in full in Respondent's opinion attached as Appendix A, did not indicate that Respondent contemplated assessing sanctions because it believed Plaintiff's appeal, although advanced in good faith, was objectively frivolous. Therefore Petitioners raised the federal questions sought to be reviewed now for the first time after Respondent's opinion was rendered in Petitioners' Petition for Hearing in the California Supreme Court. The relevant section of that Petition appears as Appendix C to this Petition.

REASONS FOR GRANTING THE WRIT

Courts in California, and throughout the country, have increasingly resorted

to imposing sanctions against litigants and their counsel as a method of controlling court calendars and fostering judicial economy. The obvious First Amendment implications of sanctioning aggressive advocacy, however, have never been considered by this Court or, for that matter, by any of the Circuits. More particularly, no court has considered whether the good-faith assertion of appellate arguments, subsequently rejected, can constitutionally be found to be sanctionable activity.

Respondent's decision has had, and if allowed to stand will continue to have, a far-reaching and pervasive chilling effect upon appellate advocacy. Counsel will be compelled to contemplate the possibility of reprisals for <u>any idea</u> -- and particularly a creative one

-- included in an appellate brief. Even if held in absolute good faith, and expressed in an otherwise meritorious appeal, creative ideas will become the basis of the imposition of sanctions. This chill will inevitably intensify in the more obscure and protean areas of the law, such as here, where an ill-defined procedural doctrine like law of the case, and an intellectually complex substantive law like defamation in elections, can combine to deter all but the most courageous counsel from voicing heartfelt, but precedent-lacking, concepts.

The right of litigants to robust appellate representation and the interest of society as a whole in a dynamic appellate bar and judiciary surely outweighs whatever advancement of judicial economy may be achieved by imposing sanctions for

raising, in good faith, a partially non-meritorious appeal. Therefore, Petitioners submit that an appellate court may only sanction the attorneys appearing before it if those attorneys pursue and argue appeals which they know are frivolous, or act with reckless disregard as to whether the appeal is frivolous.

An individual's right to conduct litigation to redress grievances is protected by the freedoms of speech and association, United Mine Workers v. Illinois State Bar Association, 389 U.S. 217, 221-22 (1967), and by the right to petition government, Bill Johnson's Restaurants, Inc. v. NLRB, 103 S.Ct. 2161, 2169 (1983), both assured by the First Amendment. U.S. Const., 1st Amend. Appellate advocacy is one aspect of such litigational behavior, and exemplifies the

reasons that constitutional protection is extended to new litigation. It is through appellate advocacy that legal ideas and theories are raised, argued and considered, and new legal concepts and procedures are developed. Such orderly development of the law is of inestimable value to a free people.

"Broad rules framed to protect the public and to preserve respect for the administration of justice can in their actual operation significantly impair the value of associational freedoms." Illinois State Bar, supra, 389 U.S. at 222. Thus, although states have an interest in maintaining orderly, efficient and fair appellate fora, there must be a careful accommodation between the interests of the State and those of appellate advocates in order to give the widest possi-

ble protection to the constitutionally protected activity.

California's rule, permitting steep sanctions to be levied against attorneys who pursue in good faith objectively frivolous appeals, is excessively broad and constitutionally impermissible. Such a rule, particularly where it is invoked to punish only parts of an appeal, has a strong chilling effect on appellate advocacy and will inevitably deter attorneys from pursuing potentially successful and path-breaking appeals.

In the present matter, Respondent, relying upon the objective test enunciated in Flaherty, supra, decided that the sanctions could be levied since no reasonable attorney would have decided that the portion of the appeal discussing the libel claims had any merit. 158

Cal.App.3d at 1008, 205 Cal.Rptr. at 540. "We need not address," Respondent declared, "the question of whether the appeal was partially frivolous on a 'subjective' basis because under Flaherty, if the appeal was objectively frivolous, sanctions could be imposed even if the record fails to demonstrate that the appeal was 'subjectively' frivolous." 158 Cal.App.3d at 1009, 205 Cal.Rptr. at 541 (citation omitted).

The question of whether an individual engaged in activity protected by the First Amendment can be punished for acting in an objectively harmful manner, without any proof of individual culpability, is not new to this Court. Rather, this Court has held in several contexts that expression which is protected by the First Amendment may only be punished when

the speaker subjectively uses that expression to achieve ends which are subject to state regulation.

The most prominent examples of such decisions are the Supreme Court cases which limit the application of state defamation law. In the seminal case of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), this Court held that a public figure cannot recover damages for a defamatory falsehood absent proof that the defendant acted with actual malice, "that is, with knowledge that [the statement] was false or [that it was made] with reckless disregard of whether it was false or not." Id. at 279-80. This Court has repeatedly and emphatically held that this standard cannot be satisfied without some proof demonstrating the state of mind of the defendant.

> "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."

St. Amant v. Thompson, 390 U.S. 727, 731 (1968); see also Bose Corp. v. Consumers Union of United States, Inc., 104 S.Ct. 1949, 1965 n.30 (1984).

> "New York Times and its progeny made it essential to proving liability that the plaintiff focus on the conduct and state of mind of the defendant. To be liable, the alleged defamer of public officials or of public figures must know or have reason to suspect that his publication is false."

Herbert v. Lando, 441 U.S. 153, 160 (1979).

The recent Bose case is an excellent example of the operation of the actual malice standard. In that case, the Court

found that the actual malice determination depended on the state of mind of the engineer who prepared an allegedly defamatory report concerning stereo speakers. The only evidence in the case was the engineer's own testimony denying that he knowingly or recklessly published any falsehoods. Noting that no other evidence was presented, the Court held actual malice was not proved. 104 S.Ct. at 1956, 1967.

A similar subjective standard was created by the Court in the field of electoral regulation in Brown v. Hartlage, 456 U.S. 45 (1982). In Brown, a candidate for county commissioner promised to reduce his salary if elected; this promise was apparently violative of a Kentucky law barring candidates from making monetary promises to voters. A

Kentucky appellate court voided the candidate's victory at the polls and ordered a new election. Id. at 47-50. On appeal, the state asserted its interest in preserving the integrity of its electoral process, Id. at 52, but this Court found that the state's regulation of all erroneous statements in political debate cut too deeply into First Amendment freedoms. After observing that under Kentucky law an election victory must be voided even if the offending statement was made in good faith and was quickly repudiated, this Court held that:

> "The chilling effect of such absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns. . . . There has been no showing in this case that petitioner made the disputed statement other than

> in good faith and without knowledge of its falsity, or that he made the statement with reckless disregard whether it was false or not." Id. at 61.

Therefore, the Court held that the punishment imposed by the state court violated the First Amendment.

The rationale of the libel and electoral regulation cases is directly applicable to the present matter. These cases recognize that some error is inevitable in free expression, and that punishment of all such errors will undoubtedly deter speakers from engaging in constitutionally desirable activity. Regulation of all erroneous and harmful speech, without inquiry into the culpability of the speaker, will create "the risk of undue self-censorship and the suppression of truthful material." Herbert, supra, 441

U.S. at 172; see also St. Amant, supra, 390 U.S. at 732.

In light of these principles, an appellate court may only sanction the attorneys appearing before it if those attorneys pursue and argue appeals which they know are frivolous, or act with reckless disregard as to whether the appeal is frivolous. An appellate court must have proof that the attorneys were subjectively aware that the appeal was baseless, harassing, vexatious, or otherwise improper, before it can impose sanctions.

This Court must "make an independent examination of the whole record", Edwards v. South Carolina, 372 U.S. 229, 235 (1963), to establish whether the sanctions imposed in this matter meet this constitutional standard. See also New

York Times, supra, 376 U.S. at 285; Bose, supra, 104 S.Ct. at 1958-65. In so doing, this Court will find that the Respondent imposed sanctions where the only evidence, in the form of declarations filed by Petitioners, demonstrated the good faith of Petitioners in readvocating the sufficiency of the libel claims. Respondent in fact expressly admitted in a sentence of its opinion which was later omitted that "the record lacks sufficient support that appellant relitigated the libel claims for any ulterior purpose."

When an attorney believes in good faith that his position is tenable and potentially victorious, it is his professional responsibility to assert it before an appellate court. Though erroneous and baseless points occasionally may be asserted, "erroneous statement is inevita-

ble in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' they 'need to survive'. . . ." New York Times, supra, 376 U.S. at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)). Advocacy in good faith must be protected if an attorney is to carry out his professional and First Amendment duties.

If the Respondent's ruling is allowed to stand, it will inevitably lead to self-censorship by appellate counsel. Self-censorship is unnecessary since appellate courts are particularly well suited to discover bad-faith arguments, and opposing counsel are also unlikely to let abuses go unchecked. Finally, appellate advocacy is too important to permit

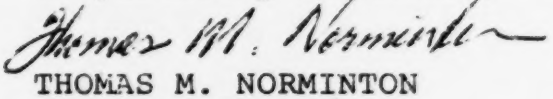
the self-censorship of potentially successful arguments.

CONCLUSION

> "Today's frivolity may be tomorrow's law. . . . We must be very cautious not to discourage attorneys from advancing such concepts or to penalize them for doing so. How might the law have developed if, prior to 1954, an attorney might have been sanctioned for asserting, contrary to settled Supreme Court case law, that separate but equal was not equal?"*

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Respondent.

Respectfully submitted,



THOMAS M. NORMINTON
LEVY & NORMINTON
815 Moraga Drive
Los Angeles, California
90049-1633
Telephone: (213) 471-3000

Attorneys for Petitioners

---

* Risinger, Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11, 61 Minn. L. Rev. 1, 57 (1976).

A P P E N D I X A

[158 Cal.App.3d 997]

[Civ. No. 69423. Second Dist., Div. Three. Aug. 1, 1984.]

[As modified Aug. 9, 1984.]

MAPLE PROPERTIES, Plaintiff and Appellant, v.
BETTY H. HARRIS et al., Defendants and Respondents.

[Opinion certified for partial publication.*]

OPINION

LUI, Acting P.J. --

SUMMARY

In this appeal, we are asked to analyze the sufficiency of the allegations of a

---

* The opinion filed contains portions which need not be published. Pursuant to rule 976.1 of the California Rules of Court, it is ordered that part III of the Discussion be deleted from the published version of the opinion.

complaint filed by appellant, a real estate developer, against the respondents, [158 Cal.App.3d 1001] private citizens who supported a referendum that repealed a city ordinance which would have allowed appellant to build a condominium project. For the reasons stated below, we conclude that the conduct of the citizens during the course of this political campaign was not actionable.

We also determine that the appeal is partially frivolous as to the libel claims because the invalidity of these claims was conclusively adjudicated by our Supreme Court. Accordingly, we assess sanctions against appellant's counsel Levy & Norminton.

FACTS AND PROCEDURAL HISTORY

As a portion of the complaint has already been thoroughly reviewed by our Supreme Court in Okun v. Superior Court (1981) 29 Cal.3d 442 [175 Cal.Rptr. 157, 629 P.2d 1369] (cert. den. 454 U.S. 1099 [70 L.Ed.2d 641, 102 S.Ct. 673]), we adopt the Supreme Court's recital of the facts of this case as our own.

Appellant, Maple Properties, "is a limited partnership that purchases, manages, develops, and sells real property. In 1977 it bought 10 acres of Beverly Hills property with a view to building condominiums. The property, then under a building moratorium pending determination of zoning, adjoined city-owned parcels. [Appellant] had discussed with city officials the possibility of a land exchange

so that [appellant] and the city each would own contiguous land. The discussions concluded successfully on November 28, 1978, when the city council agreed to the land exchange and adopted a zoning ordinance allowing plaintiff to construct condominiums on all its newly acquired property. [¶] To prevent construction, [respondents Erwin Okun, Betty H. Harris, Joann Ruden and various Does] circulated and then filed a petition to allow the electorate to reject or accept the ordinance. Consequently, the council placed it on the ballot for an election held March 9, 1979. It was rejected and thus repealed. . . ." (Okun, supra, 29 Cal.3d at pp. 447-448.)

Two months after the referendum election, appellant filed its initial complaint against respondents. The

subsequently filed first amended complaint alleged ten causes of action, namely for libel (the first, second, third and fifth causes of action), slander (fourth and sixth causes of action), violation of various federal civil rights laws (seventh and eighth causes of action) and interference with prospective economic advantage (ninth and tenth causes of action).

On April 24, 1980, respondents' demurrer to the first and seventh through tenth causes of action was sustained without leave to amend. Respondents'

[158 Cal.App.3d 1002]

demurrer to the defamation causes of action (second, third, fifth and sixth), however, was overruled. The fourth cause

of action was placed off calendar because it alleged only Doe defendants.

The Supreme Court granted a hearing on respondents' petition for writ of mandate on the defamation causes of action and eventually issued a peremptory writ of mandate directing the superior court to sustain the demurrer. (Okun, supra, 29 Cal.3d at p. 460.) The peremptory writ issued by the Supreme Court ordered the demurrer to the libel causes of action sustained without leave to amend but permitted amendment of the sixth cause of action for slander. (Id. at 460.)[1/]

On remand, the trial court, pursuant to the order of the Supreme Court, sustained

---

1/ Appellant erroneously asserts that the Supreme Court expressly permitted amendment of both the fourth and sixth causes of action. The Supreme Court's decision only permitted amendment of the sixth cause of action. (Okun, supra, 29 Cal.3d at p. 460.)

the demurrer to the libel causes of action without leave to amend.

Appellant filed a second amended complaint, alleging only a fourth cause of action for slander and a sixth cause of action for conspiracy to commit slander. The trial court sustained respondents' demurrer to the second amended complaint and denied further leave to amend. Subsequently, the trial court dismissed the entire action.

Appellant filed a timely notice of appeal which is the subject of this opinion.

CONTENTION

Appellant contends that the complaint states ten viable causes of action and that the trial court erred in sustaining

the various demurrers without leave to amend.

DISCUSSION

I

Our Supreme Court's Decision in Okun v. Superior Court (1981) 29 Cal.3d 442, Mandates Dismissal of the Causes of Action Based on Libel

Appellant first contends that the superior court erred in dismissing the libel causes of action. The allegedly libelous documents consisted of a letter

to the editor of the Los Angeles Times,[2/] an open letter to the mayor

---

2/ The letter read as follows:

"Setting the Record Straight

"The article regarding a controversial land swap between the Beverly Hills City Council and a developer of luxury condominiums ('Land Swap Stirs Up Beverly Hills' by Sam Kaplan, Dec. 26) missed the point entirely.

"To set the record straight:

"While the area in contention adjacent to Beverly Hills' civic center--is known as the industrial area, it also houses the city's vital municipal services facilities. It is the site of the city's refuse transfer station, vehicle maintenance garages and all the other indispensable operations that make a city function. It is also the site of a water treatment plant that the city council abandoned in 1976.

"This action was followed by the council's abandoning the city's own water wells in the midst of the recent drought. It was this incredible move that caused a number of citizens to become suspicious of the council's motives. Beverly Hills residents were thus forced to become completely dependent upon one very expensive source of water, that supplied by the Metropolitan Water District of Southern California. Even the MWD's general manager advised the city against this decision.

"Nevertheless, this was done despite the fact that in 1974 the voters of Beverly Hills had passed, by a two-thirds majority, a $3.75 million bond issue to refurbish the city's water wells and treatment facilities. The only council mem-

published in the Beverly Hills Courier[3/] and the statement included in the "Sample

---

ber opposed to the bond issue and retention of the city's wells was Richard Stone, an attorney.

"Mysteriously, one week after the voters approved the refurbishing of their water system, the city announced that its cost projections to revitalize the wells were $5 million short. Amazingly, a year later the claim went to $12 million more than the voter-approved bonds. But, without asking the voters again, in December, 1976, the council closed down the wells and sold off the land on which they were located.

"Not until April 12, 1977, did Richard Stone, at that time the mayor of Beverly Hills, reveal that David Rowen, representing a developer, had become a client of Stone's. The abandoned treatment plant is now earmarked for the developers in a land-swap deal."

3/ The letter provided in pertinent part as follows:

"Are we going to become a contract city, beholden to outside vendors? [¶] Where will our water come from when we are totally at the mercy of the MWD and rates treble and we are in a drought worse than the recent one? [¶] Why are we trading land which we should be buying--like other cities that are landbanking for the future? [¶] But the even larger question is who will gain from this plan? The majority of residents, or the very few individuals with a vested interest in the condominium project? [¶] And what about all the ambiguous promises to the senior citizens? The 100-unit housing promise is a blatant, political carrot in return for their dedicated support. [¶] Can you honestly tell the

Ballot and Voter Information Pamphlet."4/

---

folks there really will be such a building for them exclusively? What will the costs be? $300 a month? $650? Who will determine those with highest priority? How can you restrict entry to city residents only, if state and federal money is involved? And what about the hundreds and hundreds of needy, Beverly Hills seniors who will be left out?"

4/ The statement provided as follows:

"ARGUMENT AGAINST PROPOSITION B

"Beverly Hills has only one Industrial Area to sustain us as an independent city. We must keep it for our community needs and not allow it to be zoned away.

"Vote No on Proposition B.

"We need a place for police cars, carpentry and paint shops, city truck maintenance, park equipment, trash disposal, water facilities and other lifeline services essential to our community.

"These indispensable city services enable Beverly Hills to operate efficiently and at low cost. They must be contained in the Industrial Area for they are unpleasant neighbors. We [p. 1004] cannot afford to allow developers to take over the only suitable location within our city for these vital needs.

"Every citizen approved General Plan designated this land to be saved for municipal and service use. The developers hired one of our Councilmen, subsequently the Fair Political Practices Commission ruled the Councilman had a conflict of interest. The General Plan was changed drastically to accommodate the developer's desires, ignoring residents' needs.

In Okun, supra, 29 Cal.3d 442, the Supreme Court exhaustively analyzed these documents and concluded that they "could not reasonably have been interpreted by its probable readers as having a libelous meaning." (Id., at p. 457.) The court further concluded that leave to amend the complaint should be denied "because 'there are no circumstances under which an amendment would serve any useful pur-

---

"The Council violated the recommendation of their own consultant and the Council-appointed citizens committees when it voted this rezoning.

"THIS SCHEME WILL COST THE TAXPAYERS MILLIONS. Rubbish disposal has to be moved, street intersections redesigned, businesses relocated, city services put underground, all at prohibitive costs to taxpayers.

"ONLY THE DEVELOPERS BENEFIT FROM THIS REZONING. They will sell condominiums at up to $1,000,000.00 each, which the taxpayers will subsidize. They will get city maintained landscaping. By the Council's own admission, these luxury condominiums will cost the city more to service than revenues they will produce.

pose' [citation] . . . ." (Id., at p. 460.) (Italics added.)

Incredibly, appellant now asks this court to overturn the superior court order which complies with the clear and unambiguous directive of the Supreme Court to dismiss the libel causes of action.

Initially, appellant contended in its opening brief that our further review of the libel causes of action was warranted on grounds that subsequent to the Supreme Court's decision in Okun, "new facts" "which were not part of the record in the first appeal" were discovered. Appellant

---

"Senior Housing is being used as a deceptive cover for this 'Enrich the Developers' scheme.

"Don't jeopardize our city's future! VOTE NO ON PROPOSITION B.

"JOANN RUDEN, President League of Women Voters of Beverly Hills

BETTY H. HARRIS, Chairperson Committee to Save Beverly Hills"

urged that these "new facts" that respondent and others had agreed to make criminal complaints against Richard Stone and appellant with government agencies at the time the allegedly libelous letters were published, "add[ed] new contextual meaning" to the publications which our Supreme Court had deemed to be nonlibelous.

However, the record reveals that these additional facts were not "new" at all. Appellant now concedes that these facts were part of the record when the Supreme Court considered respondents' petition for writ of mandate and again when it considered appellant's petition for rehearing.[5/]

5/ Appellant made this concession in its reply brief to respondents' brief filed in connection with our order to show cause re sanctions and during the hearing conducted pursuant to our order to show cause.

(1) It is axiomatic that the Court of Appeal is bound by the decision of the California Supreme Court. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937].) The Supreme Court's determination of the question of the propriety of the libel causes of action is law of the case. (Richer v. Superior Court (1976) 63 Cal.App.3d 748 [134 Cal.Rptr. 52].) We can review it no further and the libel causes of action were properly dismissed.

II

This Appeal Is Partially Frivolous and Is an Appropriate Instance for the Imposition of Sanctions

A. The Procedural History and Our Order to Show Cause

We now address the question as to whether sanctions should be imposed under Code of Civil Procedure section 907[6/] and rule 26(a) of the California Rules of Court.[7/]

6/ Section 907 of the Code of Civil Procedure provides: "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just."

7/ Rule 26(a) of the California Rules of Court provides in pertinent part that, "[w]here the appeal is frivolous or taken solely for the purpose of delay . . . the reviewing court may im-

In its brief on appeal, respondent Okun requested that this court award sanctions for attorney's fees and costs on the grounds that the contentions on appeal were frivolous. (Code Civ. Proc., § 907; Cal. Rules of Court, rule 26(a).) Appellant argued against the imposition of sanctions in its reply brief.

Appellant filed a written election to waive oral argument at the hearing on the appeal set for May 16, 1984. Respondents' counsel appeared at the oral argument, argued briefly and responded to our questions; both counsel then requested sanctions against appellant for pursuing a frivolous appeal. We indi-

---

pose upon offending attorneys or parties such penalties, including the withholding or imposing of costs, as the circumstances of the case and the discouragement of like conduct in the future may require."

cated to respondents' counsel that we would consider remanding the matter for hearing in the superior court on the question of sanctions for an appeal that was frivolous with regard to the libel claims.

Upon reflection, it was our view that the issue of sanctions for an appeal which was partially frivolous was a question of law and therefore an issue we should decide. Because of our desire to follow scrupulously the dictates

[158 Cal.App.3d 1006]

of our Supreme Court's decision in In re Marriage of Flaherty (1982) 31 Cal.3d 637 [183 Cal.Rptr. 508, 646 P.2d 179] (Flaherty), and because of appellant's decision not to appear for oral argument, we

issued an order to show cause why sanctions should not be assessed against appellant and its counsel.[8/]

8/ The Order to Show Cause issued May 23, 1984, states in full as follows:

"THE COURT:

"TO MAPLE PROPERTIES AND ITS ATTORNEYS, LEVY & NORMINTON:

"Good cause appearing therefor, you are hereby ordered to appear before this court in its courtroom at 3580 Wilshire Boulevard, on June 20, 1984, at 9:00 a.m., to show why sanctions should not be assessed against you in the above appeal. (Code Civ. Proc., ¶ 907, Cal. Rules of Court, rules 26, subd. (a), and 135 [sic]; In re Marriage of Flaherty (1971) 31 Cal.3d 637, 649; see also People v. Beverly Bail Bonds (1982) 134 Cal.App.3d 960; Miller v. R.K.A. Management (1979) 99 Cal.App.3d 460, 469-470.)

"Appellant may file a brief in opposition to this order to show cause on or before June 4, 1984. On or before June 11, 1984, respondents may file a brief documenting those damages which they incurred on appeal by virtue of appellant's request that this court review the libel causes of action in the complaint below following the Supreme Court's decision in a prior but related appeal. (Okun v. Superior Court (1981) 29 Cal.3d 442.)"

The citation to rule 135 in the Order to Show Cause which refers to sanctions for frivolous appeals in the superior court, was clearly irrelevant and when read in connection with rule 26(a) which preceded it, is obviously surplusage.

Appellant and its counsel filed a 32-page brief in response to our order to show cause.[9/] This brief asserted three major contentions: (1) the proceeding instituted by our order to show cause violates their procedural due process rights because they were not afforded reasonable notice and an opportunity to be heard; (2) the appeal is not frivolous; and (3) even if the appeal on the libel claims is frivolous, the remaining six causes of action are meritorious and the appeal cannot be considered frivolous.

Subsequent to the issuance of our Order to Show Cause, we denied appellant's demand for a jury trial on the issue of sanctions and also denied appellant's motion for an extension of time to respond to our Order to Show Cause.

9/ With respect to sanctions, references to appellant shall also refer to its counsel Levy & Norminton.

B. The Flaherty Due Process Requirements Have Been Satisfied

(2) In Flaherty, our Supreme Court discussed the necessary due process requirements to be afforded a party prior to the imposition of sanctions. The court stated, "[d]ue process requires that certain basic procedural protections be afforded before the state deprives an individual of property. [Citations.] . . . [¶] . . . Fundamental constitutional mandates require that the basic protections of due process be followed before an attorney is fined for prosecuting a frivolous appeal." (Flaherty, supra, 31 Cal.3d at pp. 651-652.)

"Due process, fundamental fairness and the integrity of our judicial system all

require that counsel be permitted to pursue their clients' interests

[158 Cal.App.3d 1007]

with the confidence that they will not be singled out at random for sanctions. In proper cases, the imposition of penalties for prosecuting a frivolous appeal may be fair and may serve the useful purpose of deterring similar conduct. However, such sanctions should be imposed rarely and only if the mandates of procedural due process are obeyed. [¶] Due process is a flexible concept, and must be tailored to the requirements of each particular situation. . . . The appellate courts should exercise their statutory power to impose sanctions only after scrupulously

observing the due process mandates set forth herein. Penalties for prosecuting frivolous appeals should not be imposed without giving fair warning, affording the attorney an opportunity to respond to the charge, and holding a hearing. Further, when imposing sanctions, the court should provide the attorney with a written statement of the reasons for the penalty." (Id. at p. 654.)

Appellant's claims concerning the violation of its due process rights are specious. Appellant chose not to appear at oral argument to challenge the respondents' contentions and the request for sanctions. The request for sanctions had been made in respondent Okun's brief filed nearly six months prior to the scheduled date for oral argument. In order to comply with Flaherty, we issued

an order to show cause re sanctions.

While appellant claims our order to show cause lacked clarity and precision, its responses to our order and its arguments presented at the hearing belie this contention. An extensive brief and a supporting declaration as well as a reply to respondents' brief was filed. Appellant and its counsel appeared at the hearing with two additional counsel who were engaged to present appellant's views. Appellant's counsel engaged in a vigorous and extensive debate with respondents' counsel before this court. The briefs submitted by appellant exhaustively cited the relevant statutory and decisional authorities on the subject of frivolous appeal; the briefs squarely addressed the subject matter of our order to show cause. At the conclusion of the

hearing, we offered appellant's counsel further opportunity to brief the subject of sanctions and they declined our invitation.10/

We have complied with the due process requirements set forth in Flaherty. Our order to show cause adequately warned of the possibility of sanctions; we permitted the filing of briefs; and, we conducted a lengthy hearing during which appellant was permitted a full opportunity to present argument on the issue.

10/ The following statement was made by appellant's counsel in regard to our invitation for further briefing: "Your Honors, I believe we have submitted the basic arguments either orally just today or in our briefs and I don't think we really need additional briefing at this time. What we were complaining about was the very short fuse that we had to suffer under, but I believe we have managed to provide the basic arguments to your Honors, notwithstanding that short fuse."

C. The Appeal Concerning the Libel Claims Is Frivolous

(3) Next, we must determine whether the appeal of the libel claims is frivolous. The standards for determining when an appeal is frivolous was extensively set forth in Flaherty, supra, 31 Cal.3d 637. Because the language contained in that opinion is crucial to our determination, we quote from it at length.

"The California cases discussing frivolous appeals provide a starting point for the development of a definition of frivolous. Those cases apply standards that fall into two general categories: subjective and objective. [Citation.] The subjective standard looks to the motives

of the appellant and his or her counsel. Thus, in Simon v. Bemis Bros. Bag Co. (1955) 131 Cal.App.2d 378, 382 [280 P.2d 528], the court rejected a claim that an appeal was frivolous, noting that counsel presented his argument in a 'courteous and gracious manner' and seemed to believe 'fervently' that he might succeed on the merits. Similarly, the courts have frequently looked at the 'good faith' of the appellant and have penalized appellants where the only purpose of the appeal was delay. [Citations.]

"The objective standard looks at the merits of the appeal from a reasonable person's perspective. 'The problem involved in determining whether the appeal is or is not frivolous is not whether [the attorney] acted in the honest belief he had grounds for appeal, but whether

any reasonable person would agree that the point is totally and completely devoid of merit, and, therefore, frivolous.' [Citations.] [¶] The two standards are often used together, with one providing evidence of the other. Thus, the total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay. [Citations.] [¶] Both strands of this definition are relevant to the determination that an appeal is frivolous. An appeal taken for an improper motive represents a time-consuming and disruptive use of the judicial process. Similarly, an appeal taken despite the fact that no reasonable attorney could have thought it meritorious ties up judicial resources and diverts attention from the already burdensome volume of work at the appellate

courts. Thus, an appeal should be held to be frivolous only when it is prosecuted for an improper motive--to harass the respondent or delay the effect of an adverse judgment--or when it indisputably has no merit--when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]" (Id., at pp. 649-650.) (Italics added.)

(4) Here, the appeal of the libel claims is frivolous under the "objective" standard espoused in Flaherty, supra, 31 Cal.3d at page 649. No reasonable person would conclude that the libel claims had any merit after the decision in Okun was rendered. In Okun, the sufficiency of the libel

claims was based on the two letters and the ballot argument. The court stated that "[e]ach of those documents is non-libelous when read in light of [the] circumstances." The court further stated that "leave to amend those three [libel] causes should be denied because 'there are no circumstances under which an amendment would serve any useful purpose' [citation] and 'speedy resolution of cases involving free speech is desirable' to avoid 'a chilling effect upon the exercise of First Amendment rights' [citation]." (Okun, supra, 29 Cal.3d at p. 460.)

Facts concerning the criminal investigation were placed in the superior court record sometime in 1980 by appellant itself prior to the hearing on the first demurrer and were part of the record

before the Supreme Court in the writ proceedings in Okun. Just because the Supreme Court did not mention this "criminal investigation" in Okun does not mean that the court failed to consider these facts and then reject them. It is a rare opinion indeed which covers all the points urged by the parties in their briefs or oral argument. Furthermore, after appellant's petition for rehearing in Okun on the basis of these "new facts" was denied, no reasonable person would dispute the fact that the libel claims were totally and completely without merit.[11/]

11/ In support of its position that the appeal was not frivolous as to the libel claims, appellant presented the declaration of an attorney, who opined that the "inclusion of arguments relating to the libel causes of action in appellant's Opening Brief was not frivolous and that a reasonable attorney could have thought inclusion

We need not address the question of whether the appeal was partially frivolous on a "subjective" basis because under Flaherty, if the appeal was objectively frivolous, sanctions could be imposed even if the record fails to demonstrate that the appeal was "subjectively" frivolous. (Flaherty, supra, 31 Cal.3d at p. 650.)

D. Sanctions May Be Awarded When an Appeal Is Partially Frivolous

Appellant asserts that even if the libel claims were frivolous, the appeal

---

. . . was meritorious." However, the opinion is premised on the "newly founded context" of the "concurrent criminal investigation initiated by Respondents." Because the opinion is so premised, it must be viewed in this context and discounted.

was not frivolous because of the existence of other viable causes of action.12/ We disagree.

[158 Cal.App.3d 1010]

None of the decisions cited by the parties or uncovered by our research has squarely addressed the question of the propriety of sanctions when one or more severable and distinct issues in an appeal is frivolous, but the balance of the appeal has arguable merit. For example,

---

12/ Appellant's argument could be carried to an illogical extreme. If an appeal consists of 100 causes of action and 99 of said actions were frivolous, then the appeal could not be totally frivolous because one cause of action had merit. Therefore, we must look to the entire character of the appeal to determine whether the frivolous aspects are significant and material such as to warrant sanctions because the appeal was partially frivolous.

in Custom Craft Carpets, Inc. v. Miller (1982) 137 Cal.App.3d 120 [187 Cal.Rptr. 78], and People v. Beverly Bail Bonds (1982) 134 Cal.App.3d 906 [185 Cal.Rptr. 36], the entire action was determined to be frivolous and sanctions were imposed.

Appellant's reliance on Bank of America v. Superior Court (1942) 20 Cal.2d 697, 702-703 [128 Cal.Rptr. 357], is misplaced. That case is distinguishable because the Supreme Court's decision did not preclude further amendment of the pleading despite the sustaining of the demurrer to the complaint without leave to amend. The Okun decision, however, leaves no doubt that no further amendments would be allowed.

The reference to Anders v. California (1967) 386 U.S. 738, 744 [18 L.Ed.2d 493,

498, 87 S.Ct. 1396, 1400], in Flaherty, supra, 31 Cal.3d at page 649, is of no assistance to appellant. While it is true that Flaherty cited Anders for the proposition that "an appeal is not frivolous if 'any of the legal points [are] arguable on their merits'" (ibid.), the reference to Anders was used in the context of "'whether any reasonable person would agree that the point is totally and completely devoid of merit, and, therefore, frivolous.' [Citations.]" (Ibid.) The use of the word "point" rather than the word "appeal" to describe whether the appeal is frivolous would support the proposition that an appeal may be partially frivolous if a point on appeal has no merit and therefore the proper subject of sanctions.

While the entire appeal is not totally frivolous because it challenges the merits of the trial court's dismissal of the slander and other causes, the appeal is partially frivolous insofar as it attempts to relitigate the libel claims which were conclusively decided in Okun.

(5) Sanctions for an appeal which is partially frivolous are appropriate if the frivolous claims are a significant and material part of the appeal. Here the libel claims are not only significant and material but such claims are severable and distinct from the other causes of action.

In imposing sanctions, we are well aware of the strong public policy in favor of the peaceful resolution of disputes in our courts and that attorneys must not be deterred from pursuing their

client's remedies for fear of sanctions against them and/or their clients. Nevertheless, "the practice of penalizing frivolous appeals reflects a fear that irresponsible litigants may abuse

[158 Cal.App.3d 1011]

their right of access to the judicial system." (Flaherty, supra, 31 Cal.3d at p. 648.)

E. The Amount of Sanctions

Counsel for respondents Harris and Ruden estimated that 50 percent of his time on this appeal or $9,500 is allocable to the libel causes of action. Counsel for respondent Okun also estimates that 50 percent of the 145 hours he

devoted in defending this appeal on behalf of his clients were allocable to the libel claims. These estimates were submitted prior to the hearing on our order to show cause.

(6) In determining the amount of sanctions, we have considered the following factors: the nature and extent of the libel claims on appeal and the conclusive holding in Okun (see Beckstead v. International Industries, Inc. (1982) 127 Cal.App.3d 927, 934 [179 Cal.Rptr. 767]); the protracted length of this litigation and the delay in the resolution of the appeal (see Hersch v. Citizens Savings & Loan Assn. (1983) 146 Cal.App.3d 1002, 1012 [194 Cal.Rptr. 628] and Miller v. R. K. A. Management Corp. (1979) 99 Cal.App.3d 460, 469 [160 Cal.Rptr. 164]; the chilling effect that appellant's

actions have had on the respondents' first amendment rights and the electoral process, the relative costs of legal counsel for respondents in addressing the frivolous claims on appeal (see Wax v. Infante (1983) 145 Cal.App.3d 1029, 1031 [194 Cal.Rptr. 14]); the undue burden on the legal system and consumption of this court's time (see Custom Craft Carpets, Inc. v. Miller, supra, 137 Cal.App.3d 120, 125); and the need to deter this type of conduct in the future (see Kapelus v. Newport Equity Funds, Inc. (1983) 147 Cal.App.3d 1, 9 [194 Cal.Rptr. 893]). After weighing all of these factors, we have determined that an appropriate sanction in the form of a penalty of $20,000 is suitable and appropriate in view of appellant's use of this court to relitigate a settled question.

The opening brief of appellant and Levy & Norminton filed in response to our order to show cause states that "If, Against All The Evidence, Appellant's Contentions Are Found To Be Frivolous, The Responsibility Is Solely That Of Appellant's Counsel. [¶] The Order to Show Cause suggests that the Court is considering the imposition of sanctions against both Appellant and its counsel. Although we believe that sanctions cannot be justified in any case, the accompanying declarations make it clear that any sanctionable conduct was solely counsel's. Norminton Decl., ¶ 15; Mahboubi Decl., ¶¶ 3-7. Appellant relied on its counsel's advice, and it should not be punished for having done so." (Italics in original.) We interpret this statement in said brief to suggest that Levy &

Norminton should be sanctioned and not appellant. We shall therefore impose sanctions on counsel. This

[158 Cal.App.3d 1012]

opinion is a written statement of our reasons for imposing sanctions as required by Flaherty.

III*

. . . . . .

---

* See footnote, ante, page 997.

IV

The Court Did Not Abuse Its Discretion in Sustaining the Demurrers Without Leave To Amend

Appellant finally urges that the trial court erred in sustaining the demurrers to all of the causes of action without leave to amend. We disagree.

The superior court was, of course, precluded from allowing an amendment to the causes of action based on libel by the authority of Okun, supra, 29 Cal.3d at p. 460.

(7) As to the remaining causes of action, denial of leave to amend was appropriate. Although great liberality should be exercised in permitting a plaintiff to amend (LeMoge Electric v.

County of San Mateo (1956) 46 Cal.2d 659, 664 [297 P.2d 638]), an amendment should not be allowed where it would not serve any useful purpose. (Routh v. Quinn (1942) 20 Cal.2d 488, 493-494 [127 P.2d 1, 149 A.L.R. 215].)

As to the causes of action based on civil rights statutes and interference with economic advantage, there are no circumstances under which an amendment to the complaint could state a cause of action under the theories proffered in the absence of state action.

The question of whether appellant should have been allowed to amend the slander cause of action raises a closer question. Over the vigorous objection of three justices, the majority in Okun, supra, gave appellant the opportunity to

amend its cause of action in slander after determining that the allegation that Councilman Stone entered into a "corrupt" relationship with appellant was not slanderous in context of a political debate. The court noted the "possibility" of an appropriate amendment.

The trial court determined, and we agree, that appellant's new attempt to amend the complaint did not result in a substantial change from the allega-

[158 Cal.App.3d 1013]

tion which was held to be nonactionable in Okun, supra, 29 Cal.3d at pages 459-460.

Appellant then asked the trial court for leave to file a third amendment stating that it is prepared to allege that

respondents "expressly charged that Maple 'bribed' Stone." The trial court denied the request for a new leave to amend.

While we might be disposed to grant an additional leave to amend in a usual tort case, we are mindful that the present case seeks to inhibit fundamental First Amendment rights. Where such precious rights are involved, "speedy resolution of cases . . . is desirable" to avoid a chilling effect upon the exercise of free speech. (Good Government Group of Seal Beach, Inc. v. Superior Court (1978) 22 Cal.3d 672, 685 [150 Cal.Rptr. 258, 586 P.2d 572].)

This action is directed at citizens who were lawfully working through the political process. Respondents have been required to defend this case for nearly

five years, presumably at private expense.

The wisdom of Justice Mosk's dissent in Okun, supra, 29 Cal.3d 442, seems particularly compelling in view of the passage of time in this case. "[T]here comes a time when the finality of litigation is almost as important as the decision therein. In the preservation of the free exercise of speech, writing and the political function, the early termination of this lawsuit is highly desirable. We should discourage attempts to recover through the judicial process what has been lost in the political process." (Id., at p. 461.)

At this late date, appellant has exploited the resources of the trial and appellate courts and the defendants sufficiently. The trial court did not abuse

its discretion in denying appellant the opportunity to begin again.

DISPOSITION

The judgment of dismissal is affirmed. Respondents are awarded their costs on appeal. In addition, sanctions are imposed against appellant's counsel, Levy & Norminton, in the sum of $20,000, $10,000 each payable to respondent Okun and to respondents Harris and Ruden jointly.

Danielson, J., and Arabian, J., concurred.

A P P E N D I X B

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL
2nd District, Division 3,
Civil No. 69423

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

MAPLE PROPERTIES
v.
HARRIS et al.
KAUS, J., DID NOT PARTICIPATE.

Appellant's petition for hearing DENIED.

The request for an order directing publication of the opinion in the above entitled cause is DENIED.

BIRD, C.J. AND MOSK, J., are of the opinion the petition should be granted.

BIRD
Chief Justice

SUPREME COURT
FILED
OCT - 4 1984
LAURENCE P. GILL, Clerk

Deputy

APPENDIX C

C. THE IMPOSITION OF SANCTIONS TO PUNISH AN "OBJECTIVELY FRIVOLOUS" APPEAL IMPERMISSIBLY INFRINGES UPON THE FIRST AMENDMENT RIGHTS OF LITIGANTS AND THEIR COUNSEL TO PETITION THE JUDICIAL BRANCH OF GOVERNMENT FOR REDRESS OF GRIEVANCES AND TO SPEAK FREELY IN SUPPORT OF THEIR POSITIONS.

The First Amendment proscribes sanctioning of counsel for advocating ideas, in good faith, on Appeal. The interest of the state in efficient judicial administration advanced by sanctions is insufficiently compelling to justify punishment of good faith appellate advocacy. Further, in appeals there are obviously competing First Amendment interests:

both the appellant and respondent are exercising First Amendment rights and both must have an equal opportunity to do so. Ironically, in the present case the First Amendment has been used as an impenetrable shield at every stage of this case to bar Appellant from pursuing its claims against Respondents, while the Court of Appeal employed the same free speech guarantees as a sword to partially justify the punishment dealt to Appellant's Counsel for its petitioning and free speech activities.

A delicate balance was required here to protect the competing, and equally valid, First Amendment interests of Appellant and Respondents, yet a severe, grossly unfair and Constitutionally impermissible imbalance has been struck in

favor of Respondents against Appellant and Appellant's Counsel.

1. The Action Of The Court Of Appeal Impermissibly Punishes Appellant's Counsel For Exercising Its First Amendment Right To Seek Redress From Grievances.

Both the federal and state Constitutions guarantee the right to petition government for the redress of grievances. U.S. Const., 1st Amend.; Cal. Const., art. I, § 3. This guarantee protects the right to seek redress of grievances through the courts as well as in the executive and legislative branches of government. City of Long Beach v. Bozek, 31 Cal.3d 527, 533-4, 183 Cal.Rptr. 86, 645 P.2d 137, vacated 459 U.S. 1095, 103 S.Ct. 712, 74 L.Ed.2d 943, reiterated

33 Cal.3d 727, 190 Cal.Rptr. 918, 661 P.2d 1072 (1982), Smith v. Silvery, 149 C.A.3d 400, 406, 197 Cal.Rptr. 15 (1983), and California Motor Transport, Id.

The litigant's right to petition also proscribes sanctioning advocacy unless the litigating activity under scrutiny is a sham. California Motor Transport v. Trucking Unlimited, 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); Handgards, Inc. v. Ethicon, Inc., ___ F.2d ___ (9th Cir. slip opinion, August 2, 1984). Sanctioning objectively frivolous appeals under the standard, and for the reasons, enunciated by this Court in Flaherty, and adopted by the Court of Appeal in the present case, is improper under these Supreme Court limitations.

Under the test enunciated in California Motor Transport, a person is

immune from liability for activities consisting of petitioning the government for redress of grievances only if the petitioning is a "sham", that is, where the real goal of the litigant is not to obtain governmental action, but instead some ulterior or improper purpose. In Handgards, the court reiterated that the initiation of patent litigation is petitioning activity protected by the First Amendment, and therefore immune from liability, unless such litigation is demonstrated to be motivated by bad faith. Handgards at its page 14.

An objectively frivolous appeal is plainly not a sham under the test employed by the Court of Appeal to assess the sanctions here. The Court assessed sanctions because it judged the points made to be totally and completely devoid

of merit, not because the Court found the appeal was taken for an improper motive. Sanctioning appeals, such as this one, found to be only objectively frivolous and failing to find the presence of bad faith, abridges the Constitutionally guaranteed right of litigants and their counsel to petition government for redress of grievances.

2. The Sanction Order Is An Unconstitutional Abridgment Of Appellant's Rights Of Freedom Of Expression.

The freedom of expression is a fundamental freedom jealously guarded by the Supreme Court. Abrams v. United States, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173, 1180 (1919), (Holmes, J., dissenting). Litigation, in addition to being an act of petitioning for redress

of grievances, is a form of expression protected by the First Amendment. In Re Primus, 436 U.S. 412, 431, 98 S.Ct. 1893, 1904, 56 L.Ed.2d 417, 434 (1978); In Re Halkin, 598 F.2d 176, 187 (1979).

The Supreme Court in Primus observed that litigation can be "a vehicle for effective political expression and association, as well as a means of communicating useful information to the public." Id. at 431. The Supreme Court has recognized that "abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." N.A.A.C.P. v. Button, 371 U.S. 415, 429, 83 S.Ct. 328, 336, 9 L.Ed.2d 405, 416 (1963) (emphasis added). Infringements of these rights

are subject to the "strictest scrutiny", and are permissible only in the presence of a compelling state interest and by means narrowly tailored to advance that interest. Id. at 438.

The state interest advanced by the imposition of sanctions for an objectively frivolous appeal -- judicial economy -- is not so compelling as to justify the consequent sacrifice of precious First Amendment freedoms. The degree of importance of this state interest pales by comparison to the compelling nature of the other interests, such as reputation, private property, and even the right to a fair trial, which have been limited to make room for the exercise of First Amendment freedoms. E.g., New York Times v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686, 700-701 (1964).

By analogy, in administrative adjudications convenience of the adjudicative body alone cannot justify inhibiting the due process guarantees of the Fourteenth Amendment. Vanelli v. Reynolds School District No. 7, 667 F.2d 773, 779 (9th Cir. 1982); See Mathews v. Eldridge, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18, 33 (1976).

The unconstitutional imbalance struck between these competing interests by the Court of Appeal is particularly underscored by the circumstances of this case. Appellant's Counsel argued that the rejection by this Court of the libel counts undermined several Constitutionally protected fundamental rights of Appellant. Appellant's Counsel further charged that Respondents instigated a criminal investigation of Appellant as

part of a conspiracy to defame Appellant in order to defeat the City of Beverly Hills zoning ordinance in a referendum election. Therefore, the sanctioned arguments forwarded by Appellant's Counsel contained elements of political expression and election-related information particularly useful to the public. While it is true that Respondents have valuable First Amendment rights, Appellant asserts that its First Amendment rights are equally valuable, equally precious and equally deserving of protection.

Any limitation upon free speech and petitioning activities in litigation, premised simply upon whether ideas forwarded in good faith are "right" or "wrong", and imposed to serve only the interests of administrative efficiency, would retard the dynamic nature of our

judicial system with a coincident restriction on a traditional manner in which new law in this country is made. The decision of the Court of Appeal has therefore impermissibly abridged the rights of Appellant and Appellant's Counsel to petition government for redress of grievances and to speak freely in support of their position.

Office-Supreme Court, U.S.
FILED
FEB 25 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1211

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THOMAS M. NORMINTON and LEVY & NORMINTON,

Petitioners,

v.

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT,

Respondent.

REAL PARTIES IN INTEREST BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PAUL P. SELVIN
SELVIN AND WEINER
A Professional Corp.
1900 Ave. of the Stars
Suite 2400
Los Angeles, CA 90067

Phone: 213-277-1555

Attorneys for Real Parties Betty H. Harris and Joann Ruden

ROGER BENTLEY, ESQ.
YUSIM, CASSIDY, STEIN & HANGER
8383 Wilshire Blvd.
Suite 330
Beverly Hills, CA 90211

Phone: 213-653-6300

Attorneys for Real Party Erwin Okun

BEST AVAILABLE COPY

28 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
HISTORY OF THE CASE	5
REASONS WHY THE WRIT SHOULD NOT BE GRANTED	11
1. Petitioners' Generalized Invocation Of First Amendment Cases Does Not Address The Problem Of Frivolous Appeals Or The Power Of State Appellate Courts To Deal With Them.	11
2. The California Rule Gives Full Play To First Amendment Rights.	19
CONCLUSION	23

TABLE OF AUTHORITIES

	Page
CASES - FEDERAL	
Bill Johnson's Restaurant, Inc. v. NLRB 461 U.S. 731 (1983)	14
Bloeth v. New York 7 L.Ed.2d 780 82 S.Ct. 661 (1962)	4
Brown v. Hartlege 456 U.S. 45 (1982)	14-15
Chrisiansburg Garment Co. v. Equal Employment Opportunity Commission 434 U.S. 412 (1978)	17
Deming v. Carlisle Packing Co. 226 U.S. 102 (1912)	16
Edwards v. South Carolina 373 U.S. 227 (1963)	18
Herbert v. Lando 441 U.S. 153 (1979)	12
Herndon v. Georgia 295 U.S. 441 (1935)	4
Jenkins v. Banning 64 U.S. 455 (1860)	16
Maneikis v. Jordan 678 F.2d 720, (7th Cir. 1982)	22
McGoldrick v. Compagnie Gen. Transatlantique 309 U.S. 430 (1940)	4

	Page
New York Times v. Sullivan 376 U.S. 254 (1964)	11
Polk County v. Dodson 454 U.S. 312 (1981)	19
St. Amant v. Thompson 390 U.S. 727 (1968)	11-12
Slaker v. O'Connor 278 U.S. 188 (1929)	16
United Mine Workers v. Illinois State Bar Association 389 U.S. 217 (1967)	13
Wagner Electric Mfg. Co. v. Lyndon 262 U.S. 226 (1923)	16
Whitney v. Cook 99 U.S. 607 (1879)	16
CASES - STATE	
In Re Marriage of Flaherty 31 Cal.3d 637, 183 Cal.Rptr. 508, 646 P.2d 179 (1982)	3, 4, 17, 18, 20, 21
Maple Properties v. Harris, et al. 158 Cal.App.3d 997, 2 Cal.Rptr. 532	5, 10, 18
Okun v. Superior Court 29 Cal.3d 442, 175 Cal.Rptr. 157, 629 P.2d 1369 (1981), cert. den. 454 U.S. 1099 (1981)	6-7 9, 22

OTHER AUTHORITIES	Page
United States Constitution First Amendment	19
California Code of Civil Procedure §907	1, 2
California Rules of Court 26(a)	1
Rule 17	4
Former Rule 30	16
Rule 49.2	11, 16
28 USC 1257	4

INTRODUCTION

The Real Parties in Interest, Defendants Betty H. Harris, Joann Ruden and Erwin Okun, respectfully request that the Court deny the Petition for Writ of Certiorari. This case does not require review of the right and universal practice of both state and federal appellate courts to impose sanctions on attorneys who abuse the appellate process. The case is simply one where the California courts, under express statutory and rule authority,[1] (not referred to in the

---

(1) California Code of Civil Procedure §907. [Costs on frivolous or delaying appeal.] When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just.

California Rules of Court 26(a): [Right to costs] Except as hereinafter provided, the prevailing party shall be entitled to his costs on appeal as an incident to the judgment on appeal... Where the appeal is frivolous or taken (Footnote continued)

Petition), have, after a hearing, imposed a penalty upon attorneys for prosecuting an appeal which even the Petition concedes was objectively frivolous. The California rule is consistent with those laid down by this Court.

Petitioners do not frontally attack California Code of Civil Procedure §907 and did not do so even in their Petition for Hearing in the California Supreme Court. It is also questionable that the Petitioners have preserved the questions they seek to raise. As the Petition admits (p. 14), the questions were raised for the first time in their Petition for Hearing in the California Supreme Court,

---

solely for the purpose of delay... the reviewing court may impose upon offending attorneys or parties such penalties, including the withholding or imposing of costs, as the circumstances of the case and the discouragement of like conduct in the future may require.

because, allegedly, the Notice of the Order to Show Cause (OSC) (reproduced at p. 15 of Appendix A to the Petition) "did not indicate that Respondent [the Court of Appeal] contemplated assessing sanctions because it believed Plaintiff's appeal, although advanced in good faith, was objectively frivolous."(2) (Petition p. 14.) The OSC, however, specifically cited to California Code of Civil Procedure §907 and to In Re Marriage of Flaherty, 31 Cal.3d 637, 183 Cal.Rptr. 508, 646 P.2d 179 (1982), and Flaherty, as shown infra, is categorical that a finding of bad faith is not required for the imposition of sanctions for an objectively frivolous appeal. In short, we do not believe that Petitioners raised these questions at the first opportunity.

---

(2) The Court below in fact expressly declined to find on the issue of good or bad faith.

Herndon v. Georgia, 295 U.S. 441, 445-446 (1935).[3] Cf. McGoldrick v. Compagnie Gen. Transatlantique, 309 US 430, 434-5 (1940), and Bloeth v. New York, opinion in chambers of Mr. Justice Harlan, 7 L.Ed.2d 780, 82 S.Ct. 661 (1962).

The case simply does not qualify for review under 28 USC 1257 and Rule 17. We briefly address the merits.

---

(3) "Appellant, of course, cannot plead ignorance of the ruling in the Carr Case, and was therefore bound to anticipate the probability of a similar ruling in his own case, and preserve his right to a review here by appropriate action upon the original hearing in the court below. It follows that his contention that he raised the federal question at the first opportunity is without substance, and the appeal must be dismissed for want of jurisdiction." (Herndon, 295 US at 446).

The Carr Case in Herndon corresponds with the Flaherty case here, although in Flaherty the appeal was not held to be frivolous.

HISTORY OF THE CASE

The Petition for Certiorari obscures the particular facts of this case:[4]

In 1981, after a full hearing on the merits, the California Supreme Court issued its opinion and a Writ of Mandate ordering the Los Angeles Superior Court to sustain without leave to amend the general demurrers of the defendants to the libel causes of action in Maple Properties' ten count Complaint and to

---

(4) The case below was Maple Properties, a Limited Partnership, v. Harris, et al., in the Los Angeles Superior Court, Case No. C 299 570. The opinion of the California Court of Appeal (158 Cal.App.3d 997, 2 Cal.Rptr. 532, Appendix A to Petition) and Petitioners' Petition for Hearing to the California Supreme Court bore the same caption. The Petition for Writ of Certiorari is now captioned Thomas M. Norminton and Levy & Norminton, Petitioners, v. The Court of Appeal of the State of California, and does not contain the names of defendants-real parties in interest.

dismiss those causes. Okun v. Superior Court, 29 Cal.3d 442, 175 Cal.Rptr. 157, 629 P.2d 1369 (1981). The California Supreme Court stated:

> "On the sustaining of demurrers to the second, third, fifth, and sixth causes of action should plaintiff be given leave to amend? Sufficiency of the second, third, and fifth causes turns on the presence of libel in two letters and a ballot argument. Each of those documents is nonlibelous when read in light of circumstances alleged here that would have to be considered even if omitted from an amended pleadings (Reichert v. General Ins. Co. (1968) 68 Cal.2d 822, 836-837 [69 Cal. Rptr. 321, 442 P.2d 377]). Accordingly, leave to amend those three causes should be denied because 'there are no circumstnaces under which an amendment would serve any useful purpose' (Routh v. Quinn (1942) 20 Cal.2d 488, 493-494 [127 P.2d 1, 149 A.L.R. 215]) and 'speedy resolution of cases involving free speech is desirable' to avoid 'a chilling effect upon the exercise of First Amendment rights' (Good Government, supra, 22 Cal.3d at 685)." (29 Cal.3d at 460).

A Petition for Rehearing, in which Maple Properties argued that it should be given leave to amend the libel causes, was denied. A Petition for Writ of Certiorari was then denied. 454 U.S. 1099 (1981). All of this occurred almost four years ago.

In 1982 the Superior Court complied with the California Supreme Court's Mandate and entered an Order sustaining the general demurrers to the libel causes without leave to amend. After further proceedings, the Superior Court dismissed the case. In 1984, on the subsequent present appeal from the Order of Dismissal, Maple Properties reargued at length the alleged merits of all of its causes of action, including the libel causes which the prior opinion and Order of the California Supreme Court precluded it

from doing. Petitioners' briefs repeated the arguments which had been previously made to and categorically rejected by the California Supreme Court. As found by the California Court of Appeal, a significant, material and severable portion of Maple Properties' appeal was frivolous and was so beyond any argument:

> ". . . the invalidity of these claims was conclusively adjudicated by our Supreme Court [in this very case] . . . '[the appeal] indisputably has no merit -- . . . any reasonable attorney would agree that the appeal is totally and completely without merit.'" (158 Cal.App.2d at 1001 and 1008, Petition Appendix A, pp. 2 and 23.)

The Court of Appeal imposed a penalty on Maple's attorneys, the Petitioners here. The California Supreme Court denied the attorneys' Petition for Hearing, and the present Petition for Certiorari followed.

A now admitted fact is particularly damning: Petitioners argued below that they were permitted to avoid the unequivocal mandate of the California Supreme Court in Okun and permitted to reargue the sufficiency of their libel causes because they had allegedly "discovered new facts" since the Okun opinion. However, the alleged "new facts" had been placed into the record in the trial court in 1981 by Petitioners themselves before the opinion by the California Supreme Court in Okun; Petitioners had argued precisely those facts in their briefs in the California Supreme Court in 1981.(5)

---

(5) This was pointed out at length by Real Parties in their briefs in the Court of Appeal, but Petitioners continued to make their "newly discovered facts" argument, including in their response to the Order to Show Cause. Petitioners admitted that the alleged facts were not "newly discovered," only in their reply and final papers on the OSC. [See opinion below, 158 Cal.App.3d at 1004 and 1009, pp. 10-12 and 23-25 of Appendix A to Petition.)

Further, Petitioners had argued for almost 5 years that Maple Properties' constitutional rights had been violated and that it had suffered over $62,000,000.00 general and special damages. (Prayer to Maple Properties' Complaints). In addition to the named defendants, 1,000 Does, all identified as citizens and voters of Beverly Hills, were made defendants. Yet Petitioners did not even appear in the appellate court to argue the cause on the merits. The question as presented on page 2 of the Petition is thus obviously distorted, as the Court of Appeal expressly refused to determine that Petitioners acted in good faith. (158 Cal.App.3d at 1009, Petition, Appendix A, page 25) (6)

---

(6) The Petition (p. 27) erroneously states that ". . . the Respondent imposed sanctions where the only evidence, in the form of declarations filed by Petitioners, demonstrated the good (Footnote continued)

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. Petitioners' Generalized Invocation Of First Amendment Cases Does Not Address The Problem Of Frivolous Appeals Or The Power Of State Appellate Courts To Deal With Them.(7)

Petitioners cite New York Times v. Sullivan, 376 U.S. 254 (1964); St. Amant

---

faith of Petitioners in readvocating the sufficiency of the libel claims." The Court of Appeal found that the appeal was one that no reasonable attorney could have thought to be meritorious. By itself, this is not proof of bad faith; but with other evidence it is relevant to that issue. The record shows that no new substantive arguments were advanced in support of the libel causes; the arguments made almost four years previously to the California Supreme Court were simply repeated. Petitioners' failure to appear to argue the merits of the appeal also is evidence relevant to the issue of bad faith.

(7) See also this Court's own Rule 49.2 and cases under its predecessor.

v. Thompson, 390 U.S. 727 (1968); Herbert v. Lando, 441 U.S. 153 (1979) (Petition, pp. 21-22), and rely on the actual malice standard in public official defamation cases. However, this case reaches the Court on the admitted premise that the appeal was objectively frivolous. No attack is made on that finding. Petitioners' argument would require appellate courts to engage in discovery and findings concerning the attorney's intent and state of mind. But courts are not the electorate and attorneys are not political candidates; courts decide cases and attorneys are professionals. Objective standards must apply to them. In short, the prosecution of a frivolous appeal simply does not equate with discussion concerning public officials.

Even if the defamation cases were analogous, an actual malice standard for sanctions for frivolous appeals is not required. Most defamation actions are decided on a negligence standard, not on an actual malice standard, and such is consistent with the First Amendment. The record here, of course, shows negligence as a minimum.

Petitioners' other authorities are even farther afield. United Mine Workers v. Illinois State Bar Association, 389 U.S. 217 (1967) simply held "that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights." (389 U.S. at 221-222.)

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983), held that prosecution of a state court lawsuit, regardless of the plaintiff's motive, could not be enjoined by the National Labor Relations Board unless the suit lacked a reasonable basis in fact or law. Our case does not deal with the power to enjoin litigation. At p. 743 of 461 U.S., the Court states:

> Just as false statements are not immunized by the First Amendment right to freedom of speech, see Herbert v. Lando, 441 U.S. 153, 171, 60 L.Ed.2d 115, 99 S.Ct. 1635 (1979); Gertz v. Robert Welch, Inc. 418 U.S. 323, 340, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974), baseless litigation is not immunized by the First Amendment right to petition.

Appeals are part of litigation, and a baseless appeal, like any baseless litigation, is not immunized by the First Amendment right to petition. Brown v.

Hartlege 456 U.S. 45 (1982) (Petition, pp. 23-25), dealt with election law.[8] Petitioners quote this language from Brown:

> "The chilling effect of such absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns." (456 U.S. at 61)

But the California rule imposes no absolute accountability for factual or even legal misstatements.

This Court has long recognized the power of appellate courts to award dam-

---

(8) "The question presented is whether the First Amendment, as applied to the states through the Fourteenth Amendment, prohibits a state from declaring an election void because the victorious candidate had announced to the voters during his campaign that he intended to serve at a salary less than that 'fixed by law.'" (456 U.S. at 47)

ages and sanctions for frivolous appeals or petitions without reference to the "actual malice" of the attorneys. The standard of frivolousness is an objective one for the court itself. Jenkins v. Banning, 64 U.S. 455, 457 (1860); Whitney v. Cook, 99 U.S. 607 (1879); Deming v. Carlisle Packing Co., 226 U.S. 102 (1912); Wagner Electric Mfg. Co. v. Lyndon, 262 U.S. 226 (1923); Slaker v. O'Connor, 278 U.S. 188 (1929); U.S. Supreme Court Rule 49.2 (see also former Rule 30).

The rule applied by the California courts under its state statute for the infrequent imposition of penalties for prosecuting frivolous appeals is consistent with this Court's own rule; and it is identical to the rule for award of attorneys' fees to defendants where

plaintiffs have pressed frivolous claims under the Civil Rights Act of 1964. In Chrisiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978), this Court held:

> "In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith." (434 U.S. at 421)

In In Re Marriage of Flaherty, 31 Cal.3d 637, 183 Cal.Rptr. 508, 646 P.2d 179 (1982), which the California Court of Appeal followed to the letter in this case, the California Supreme Court held:

> "Thus, an appeal should be held to be frivolous only when it is prosecuted for an improper motive -- to harass the respondent or delay the effect of an adverse judgment -- or when it indisputably has no merit -- when any reasonable attorney would

> agree that the appeal is totally and completely without merit. (See Estate of Walters, supra, 99 Cal.App.2d at pp. 558-559)" (31 Cal.3d at 650)(9)

Far from penalizing an offense "not susceptible of exact definition,"(10) the California rule is clear and precise and is applied with caution. It will not inhibit advocacy, it permits the prosecution of meritless appeals and the advocacy of meritless arguments. The appeal of the libel causes here was not simply meritless, it was frivolous and objectively so. (See esp. pp. 1008-1009 of 158 Cal.App.3d, Petition Appendix A, pp. 23-25)

---

(9) See lengthy extract from Flaherty reproduced by the Court of Appeal in this case, 158 Cal.App.3d at 1008-1009, Petition Appendix A pp. 20-23.

(10) Edwards v. South Carolina, 373 U.S. 227, 229 (1963). Edwards is cited at Petition, p. 26.

2. The California Rule Gives Full Play To First Amendment Rights.

Petitioners argue that this case will have a "pervasive chilling effect upon appellate advocacy" (Petition, p. 15) The argument is without merit.

This Court itself has distinguished between appeals which have no merit and appeals which are frivolous.

> "[Counsel's] role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw." Anders v. California, 386 U.S. 738, 743-44 (1967)

More recently, in Polk County v. Dodson, 454 U. S. 312, 323 (1981) the Court stated:

> "It is the obligation of any lawyer -whether privately retained or publicly appointed -- not to cloud the courts with frivolous motions or appeals."

The California Supreme Court in In Re Marriage of Flaherty 31 Cal.3d 637 (1982) examined at length the issues raised by the imposition of sanctions on attorneys for prosecuting frivolous appeals. It severely restricted the power of California appellate courts to impose such sanctions. As shown, its rule is consistent with those approved by this Court and takes full account of the to-be-avoided potential that indiscriminate use of sanctions for frivolous appeals may deter vigorous advocacy. The Flaherty opinion states:

> However, any definition must be read so as to avoid a serious chilling effect on the assertion of litigants' rights on appeal. Counsel

> and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is not by definition frivolous and should not incur sanctions. Counsel should not be deterred from filing such appeals out of a fear of reprisals. Justice Kaus stated it well. In reviewing the dangers inherent in any attempt to define frivolous appeals, he said the courts cannot be "blind to the obvious: the borderline between a frivolous appeal and one which simply has no merit is vague indeed . . . The difficulty of drawing the line simply points up an essential corollary to the power to dismiss frivolous appeals: that in all but the clearest cases it should not be used." (People v. Sumner, supra, 262 Cal.App.2d at p. 415). The same may be said about the power to punish attorneys for prosecuting frivolous appeals: the punishment should be used most sparingly to deter only the most egregious conduct. (31 Cal.3d at 650-651)

The California Supreme Court held the appeal in Flaherty not to be frivolous, thus reversing sanctions there imposed by the Court of Appeal. (See 31 Cal.3d at 640-641 and 651.) Here, the

California Supreme Court in 1981 ruled on the merits that Maple Properties could not plead any libel causes. Okun v. Superior Court 29 Cal.3d 442 (1981). On a second appeal almost four years later, Petitioners, in the face of the Supreme Court Order, reargued the same libel issues. After examination of the record and after a hearing, the Court of Appeal determined, properly, that the appeal as to the libel causes was frivolous. The California Supreme Court then denied a hearing. We submit: it would be improvident for this Court now to hear this case. Indeed, the Petition for Certiorari is a fit subject for this Court's sanction under its Rule 49.2. Compare Maneikis v. Jordan, 678 F.2d 720, 722 (7th Cir. 1982).

CONCLUSION

The decision below creates no conflict among the nation's lower courts. It has been upheld under the California statute and Constitution and is consistent with the opinions and Rule of this Court. It requires no review here.

DATED: February ___, 1985

Respectfully submitted,

PAUL P. SELVIN
SELVIN AND WEINER
A Professional Corporation

ROGER BENTLEY
YUSIM, CASSIDY, STEIN
& HANGER

By _____
PAUL P. SELVIN
Attorneys for Real Parties
in Interest